IN THE

Supreme Court of the United States

October Term, 1973
No. 73-203

MORTON EISEN, On Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on The New York Stock Exchange Similarly Situated,

Petitioner,

vs.

CARLISLE & JACQUELIN, *et al.*,

Respondent.

On Writ of Certiorari From the United States Court of Appeals for the Second Circuit.

Motion for Leave to File Brief Amicus Curiae, and Brief for the Amicus Curiae Southern California Edison Company.

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On Writ of Certiorari From the United States Court of Appeals for the Second Circuit.

Motion for Leave to File Brief Amicus Curiae, Urging Affirmance.

Southern California Edison Company (hereinafter referred to as Amicus Edison), pursuant to Rule 42 of United States Supreme Court, hereby respectfully moves this Court for leave to file a brief *Amicus Curiae* urging affirmance of the decision of the United States Court of Appeals for the Second Circuit in *Eisen v. Carlisle & Jacquelin* (2d Cir. 1973) 479 F.2d 1005. The consent of the parties to file such a brief has been sought and refused by Counsel for the Petitioner.

Southern California Edison Company is a privately owned public utility engaged in the production and distribution of electrical energy in Southern California and other western states. As such Amicus Edison is involved in environmental class action suits instituted by private individuals to recover money damages in both the State and Federal Courts. One such action presently pending is *Richard Carlson, Norman Rosen, Donald Fulmer, William Hirchag,* and *Lyman Rich on Behalf of Themselves and All Other Persons Similarly Situated v. Southern California Edison Company,* Los Angeles County Superior Court Number 987456. The outcome in the instant case will determine the pretrial procedures with regard to the prerequisites of maintaining a class action including notice, manageability, and the determination as to whether there are common questions of law or fact as well as the appropriate use, if any, of the concepts of the "mini-hearing" and "fluid recovery".

Thus, the issues raised in the *Eisen* case are integral to the prosecution and defense of class action lawsuits and should only be determined after consideration of complete briefing of the questions presented. The Circuit and District Courts have dealt with this case primarily in terms of the notice requirements and which party is to bear their cost. However, as indicated above, the implications and effects of the Circuit Court decision reach to every corner of the prerequisites to maintenance of a class action. Furthermore, no party to this action is directly concerned with the effects of

the Circuit Court decision on environmental class actions seeking money damages.

The brief of Amicus Edison analyzes, the issues raised in the *Eisen* case in regard to environmental class actions rather than class actions based upon consumer protection or anti-trust legislation. In addition, it deals in depth with the concepts of "fluid recovery" and the "mini-hearing" and the issues of manageability, common questions of fact or law, and notice. Briefing with regard to environmental class actions brought for money damages is integral in the instant case in that, as more fully set out in the brief of Amicus Edison, such actions are uniquely concerned with the issues of notice, manageability and common questions of fact or law raised by the case now before the Court. This is particularly true because plaintiffs in environmental class actions tend to be difficult to identify and locate, their damages tend to be diverse in amount and different in kind and the issues of fact and law tend to vary with regard to the proof of proximate cause as well as damage.

Amicus Edison respectfully urges that no decision in the instant case should be reached without consideration of its effect upon environmental class actions seeking money damages. The brief of Southern California Edison Company examines the issues raised by the *Eisen* case in light of environmental class actions for money damages pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

Wherefore, Southern California Edison Company respectfully requests this Court permit it to file the brief *Amicus Curiae* submitted herewith.

Respectfully submitted,
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Brief of the Amicus Curiae Southern California Edison Company.

Introduction.

Southern California Edison Company (hereinafter referred to as Amicus Edison) is a privately owned public utility engaged in the production and distribution of electrical energy in Southern California and other western states. As such Amicus Edison is involved in environmental class action suits instituted by private individuals to recover money damages in both the state and federal courts.

Eisen v. Carlisle & Jacquelin, the case now before this Court, is different than environmental class action suits instituted by private individuals to recover money dam-

ages in factual context, legal basis and the legal and social purpose or philosophy intended to be implemented by the class action procedure. Thus, the issues raised in the instant case must be carefully examined as to their legal and practical effects and considerations in private environmental money damage class actions. As is more fully set out later in this brief submitted by Amicus Edison, the effects with regard to notice, the mini-hearing, fluid recovery, and manageability are of particular concern in light of the constitutional protections of due process.

I.

The Factual Context, Legal Basis and Social Purpose of the Type of Class Action Prosecuted in the Instant Case Differs Markedly From That in Environmental Class Actions Which Seek Money Damages for Individual Claims.

Eisen v. Carlisle & Jacquelin is a lawsuit instituted by an investor on behalf of himself and other odd-lot stock investors against major odd-lot dealers and the New York Stock Exchange. While the number of members of the class is extremely large and has been estimated at 6,000,000 members, 2,250,000 can be easily identified and an additional 250,000 or more members participated in listed transactions which are identifiable.[1] Furthermore, damages are mathematically computable assuming liability. Each individual odd-lot transaction has an average odd-lot differential of $5.18. Assuming a 5% overcharge the recovery is $1.30, and when trebled $3.90.[2]

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[1] *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1009 (2d Cir.), cert. granted, 42 LW 3226 (1973).

[2] *Eisen v. Carlisle & Jacquelin, supra* at 1010.

By contrast environmental class actions are uniquely susceptible to widely distributed, largely undefined classes with a numerical membership vast in comparison to that in the *Eisen* case. Environmental class actions have sought reparations on behalf of "all of the people in the United States," including "those yet unborn", "municipal taxpayers", and "residents" of a state or states, or otherwise defined large geographic areas.

Such actions will ordinarily fall under Rule 23(b)(3) of the Federal Rules of Civil Procedure since the risk of incompatible adjudications under Rule 23(b)(1)(A) is minimal and the likelihood of the claims of individual members disposing of or substantially impairing the interests of other members, not members of the class pursuant to Rule 23(b)(1)(B) is small. Neither do environmental class actions seeking money damages tend to be appropriate under Rule 23(b)(2) in that this subsection of the Rule is inapplicable where the appropriate relief relates predominately to money damages. Advisory Committee's Note of 1966 to Revised Rule 23, 39 F.R.D. 69, 102 (1966); see also *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968).

Thus, the prerequisites to maintenance of a class action outlined in Federal Rules of Civil Procedure 23(b)(3) are of vital significance to environmental class actions seeking money damages.

Rule 23(b)(3) requires that the questions of fact or law predominate over questions affecting only individual members and that a class action be the superior available method for the fair and efficient adjudication of the controversy. Federal Rules of Civil

Procedure 23, subd. (b), subsec. (3). In that regard, Rule 23(b)(3)(d) requires that the difficulties of manageability be assessed. Furthermore, with regard to class actions pursuant to Rule 23(b)(3), Rule 23(c)(2) requires the best practicable notice under the circumstances to members of the class including individual notice to all members of the class who can be identified through reasonable effort.

Embodied in the above recited requirements of class actions pursuant to Rule 23(b)(3) are certain concepts of integral concern with regard to environmental class actions. These concepts are carefully analyzed as they relate to environmental class actions for money damages in the subsequent sections of this brief. Specifically, the concepts to be dealt with are those of the mini-hearing, notice, manageability and the issues of predominance of common questions of fact or law, fluid recovery and damages and their interrelation.

As recognized by the Advisory Committee's Note to Revised Rule 23, each requirement of Federal Rule 23 and each concept embodied in that Rule, particularly with regard to Rule 23(b)(3) must be applied in a manner consistent with the protections of the Due Process Clause of the Fifth Amendment to the United States Constitution accorded both plaintiffs and defendants. Advisory Committee's Note of 1966 to Revised Rule 23, 39 F.R.D. 69, 107 (1966); 28 U.S.C. Section 2072.

II.

The Constitutional Protections of Due Process of Law Require That Any Order Issued Pursuant to Rule 23(c)(1) Be Conducted in a Hearing Identical to That of a Trial Where Evidence Is Taken, Testimony Is Given, Witnesses Are Cross-Examined, Findings Are Rendered and the Order Then Issued Is Appealable.

Much of the discussion in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), (hereinafter referred to as "*Eisen III*") deals with an impact of Rule 23(c)(1) at the time which the court must determine, in some manner, whether an action may be maintained as a class action or not. This concern is shared by Amicus Edison in the area of environmental class actions against public utilities such as itself. In rejecting the concept of the so-called mini-hearing the court in *Eisen III* stated at page 1015:

> But neither in amended Rule 23 nor in any other rule do we find provisions for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law. In most cases the so-called tentative findings and conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable.

It thus appears that the Court in *Eisen III* arrived at its decision based upon two factors, to wit, an inability to find the mechanism for hearing in Rule 23 itself and a fear that any mini-hearing would be highly prejudicial to the parties because of the absence of procedural safeguards that are applicable to full scale trials on the merit.

Amicus Edison fully agrees with the result of *Eisen III* based on the facts that were present there. However, the most important objection to a mini-hearing, the lack of procedural safeguards embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution, can be overcome. The terminology mini-hearing is unfortunate because it presupposes that such a hearing requires a lesser degree of procedural protection. A first step in the right direction might be to discard the nomenclature "mini" and recognize the fact that any hearing which is held under Rule 23 must be carried on in the same manner as a regular trial.

While the Court in *Eisen III* is correct in saying the language does not specifically provide for a hearing, there is to be no other practical way for a court to issue an order determining whether an action brought as a class action should be so maintained. Rule 23(c)(1) makes it mandatory for the trial court to make such a determination. If a conscientious effort is made to satisfy this requirement the holding of a hearing is a necessary step in not only satisfying the requirement, but providing the protections of due process for both plaintiffs and defendants. It would seem obvious that under Rule 23(c)(1) something more is contemplated than the trial court merely perusing the pleadings to satisfy itself that the allegations are sufficient to qualify the action as a class action.

The need for a full hearing in those actions under Rule 23(b)(3) is even more compelling than in class actions brought under Rule 23(c)(1) or 23(b)(2) due to the fact that in a suit under Rule 23(b)(3) not only must the provisions of Rule 23(a)(2) be satisfied, but also those of Rule 23(b)(3). Thus, an action under Rule 23(b)(3) must have predominant questions of fact or law common to the class and also a *finding* that "the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members . . ." (emphasis added). Federal Rules of Civil Procedure Rule 23, subd. (b), subsec. (3).

The practical problem of satisfying Rule 23(a)(2) and Rule 23(b)(3) is even greater in an environmental action seeking money damages because the interest of the individual claimants are so diverse. For example, an environmental class action seeking money damages that involves air, water or radiation pollution could well cover an extremely large geographical area and affect a great number of people. The need for establishing proximate cause for any injury suffered and damages flowing therefrom for each individual would be distinct and different requiring each such person to prove at least these two factors himself. The task of determining whether or not such an action is properly a class action seems to demand a hearing of some magnitude.

The Advisory Committee's Note of 1966 to Revised Rule 23, 39 F.R.D. 69, 103, which discussed the 1966 changes to Rule 23, recognizes the problem presented by Rule 23(b)(3). The Committee stated:

> The court is required to find, as a condition of holding that a class action may be maintained under the subdivision, that the questions com-

> mon to the class predominate over questions affecting individual members. It is only where this predominance exists that economy can be achieved by means of the class-action device.

The Committee further recognized that:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways.

Despite its awareness of the problem, the Committee made no suggestion as to how the trial court would satisfy the above referred to stringent provision. It is the suggestion of Amicus Edison that the only fair and proper method by which the trial court can issue an order regarding the propriety of a class action is to hold a hearing in which all the protections of due process of law are employed and recognized.

The decision in *Eisen III*, in addition to disapproving the mini-hearing, expressed considerable concern over the scope of any such hearing. A similar result, that the preliminary hearing on the merits was improper, was reached by the Fifth Circuit in *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424 (5th Cir. 1971). *Eisen III* and the *Miller* case reject the procedure used in *Dolgow v. Anderson*, 53 F.R.D. 664 (1971). The court in *Dolgow v. Anderson, supra*, held what appears to be a very complete hearing. It received evidence and allowed examination and cross-examination of witnesses and argument of counsel in order to determine whether or not the possibility of recovery on the merits was so slight as not to justify the enormous expense of the

case proceeding as a class action. The Court in *Dolgow v. Anderson, supra,* also discusses the burden of proof required of plaintiff in order for the court to make its determination. The Court held that a higher burden of proof is required than that which is necessary on a motion seeking a summary judgment.

While *Eisen III* indicates that the so-called hearing should not be a trial on the merits or a hearing as to who should pay for notice, it does seem to suggest that some form of hearing be held to answer that question and whether the requirements of Rule 23 are met. *Eisen III, supra* at page 1016. Amicus Edison urges, however, that environmental class action suits for money damages are considerably different than those brought under antitrust laws and may require broader scope of consideration at a hearing to determine class propriety.

The following guidelines are suggested as the proper scope of the hearing to determine the propriety of a class action where an environmental class action under Rule 23(b)(3) is brought. First, the scope of any such hearing should be as broad as necessary to determine if the requirements of Rule 23 are met even if this involves making some ruling on the merits of the action. For example, a class action for damages based upon the release of pollutants into the air could raise a problem with regard to liability where the plaintiffs are within a very large geographical area. In order to determine whether or not there are common questions of fact or law, the court may be required to establish whether or not the amount of pollution had a significant effect upon any particular area within the greater boundaries and was a negligent act or a violation of law. In coming to its conclusion, the trial court could find that in a particular area within the broader geo-

graphical boundaries, due to the small amount of actual pollutants emitted as a result of the acts of the defendant, the pollution was so insignificant that there was no proximate cause, damage or negligence. This would be a determination of propriety of the class, but also one as to liability on the merits. This broad scope of inquiry further points out the need for due process protection at such a hearing.

There would appear to be no justifiable reason why the determinations required to be made by the trial court under Rule 23(a), Rule 23 (b)(3), Rule 23(c)(1), Rule 23(c)(2), and Rule 23(d) should not be arrived at without a hearing that affords the full protection of due process of law. Each and every decision made pursuant to the above referred to subdivision of Rule 23 has equal impact and as stated in *Eisen III* ". . . will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable." *Eisen v. Carlisle & Jacquelin, supra* at 1015.

In fact, those orders which are issued under Rule 23(d) may well have the most serious impact upon parties to a class action in that that subdivision of the Rule contemplates that the nature and scope of the action may change from time to time. Such flexibility is undoubtedly desirable but places a considerable burden on any party to protect or preserve his position in the event an appeal is subsequently deemed advisable.

Further, the burden upon the trial court in issuing orders under Rule 23(d) is considerably increased in a Rule 23(b)(3) situation since the court is under a greater duty to protect members of the class and to see that the action is conducted fairly for all parties. That

such is the case is recognized by the language of Rule 23(c)(2) which requires a higher degree of notice than is required in Rule 23(b)(1) and Rule 23(b)(2) actions. Furthermore, under Rule 23(b)(3), with its specific stringent prerequisites to maintenance of a class action, the trial court must also find that the questions of fact or law common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The determination these requirements are not met precludes subsequent orders under Rule 23(d).

Other issues attached to use of a hearing are whether or not findings should be prepared by the court in order to support the result of the orders and the appealability thereof. The necessity for findings to support an order would appear to be imperative so that the parties to an action can fully understand the issues and effects of an order which is rendered. This problem was discussed in *Interpace Corporation v. City of Philadelphia,* 438 F.2d 401 (5th Cir. 1971), wherein the majority of the Court felt that the word "finds" in Rule 23(b)(3) did not mean that formal findings were necessary. Amicus Edison urges that the dissent in *Interpace Corporation v. City of Philadelphia, supra* at 406 properly analyzes not only the inapplicability of Rule 52(a) but also the proper rationale for requiring findings to support an order under Rule 23(b)(3). There Judge Adams states:

> "A primary reason for such extra requirements is that Rule 23(b)(3) now makes binding on all class members a decision which formerly—under the designation of a 'spurious' class action—might bind only the actual litigants. [Footnote exclud-

> ed]. The possibilities under the Rule for extremely broad geographical, temporal and substantive actions make imperative a more stringent definition of 'class,' and justify placing a greater responsibility on the trial court than existed prior to 1966. [Footnote excluded]. Nor can we disregard the expanding use of the class action device in important litigation matters affecting substantial portions of our citizenry. Because of the dangers for abuse, therefore, courts of appeals should insist that the requirements of Rule 23(b)(3) be met in each case."

The argument of the Court quoted above further points out the fact that orders either allowing or denying class actions which result from proper hearings should be appealable. Also, footnote 1 in *Eisen III, supra* at page 1007, recognizes the impact of a decision on the propriety of an action as a class action. As the application of amended Rule 23 is determined by use and appellate decision, it would seem imperative that there be a faster method of determining questions of propriety of class than to have an action proceed completely through trial and then a decision that that action was not properly brought only after considerable effort and great sums of money have been expended to the detriment of all parties. In order to have an effective appeal which will be of significance, findings are even more imperative. The example given by the Advisory Committee, 39 F.R.D. 69, 103, illustrates the problem.

> . . . [A] fraud perpetrated on numerous persons by use of similar misrepresentations may be an appealing situation for class action, and it may remain so despite the need, if liability is found, for

> separate determination on damages suffered by individuals within the class. On the other hand although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the misrepresentations made or the kinds or degrees of reliance by the persons to whom they were addressed.

If a class action were brought in the situation suggested above, an order of the court that the class action was properly brought would have little significance and fail to present sufficient information for any appellate court to determine whether or not the trial court was correct or in error. Findings by the trial court as to whether the misrepresentations were similar would, at the very least, be of assistance to the appellate court in making its decision. For the above reasons, Amicus Edison strongly urges that findings and appealability from orders rendered under Rule 23 be required and that the procedure employed for appeal be that of 28 U.S.C. 1292(a).

Lastly, there remains the question of who has the burden of proof in any hearing under Rule 23. Logically, the burden of showing that the provisions of Rule 23 are satisfied should be borne by the plaintiffs. Consistent with this approach is the decision of *Bel Air Markets v. Foremost Dairies, Inc.*, 55 F.R.D. 538, 540 (1972) at Footnote 1, wherein the court stated:

> In any class action, the plaintiff has the burden of showing the provisions of Rule 23 Fed. R.Civ.P., are satisfied. *Philadelphia Electric Company v. Anaconda*, 43 F.R.D. 452 (E.D.Pa. 1968); *City of Philadelphia v. Emhart Corp.*, 50 F.R.D. 232 (E.D.Pa. 1970). In this case the parties agreed

that the plaintiffs must satisfy the requirements of both Rule 23(a) and 23(b)(3) Fed. R.Civ.P., in order to maintain this class action. Rule 23(a) requires that (1) the class is so numerous, joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class.

Rule 23(b)(3) requires in addition to satisfying the requirements of 23(a), the court must find that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Amicus Edison urges that such an approach is totally fair inasmuch as plaintiffs are the proponents of the class nature of the action and have initiated it. It would be an absurd situation wherein defendants would be required to go into a hearing with the presumption that an action is properly brought and then be required to disprove the class nature of the action in light of the various factors which are to be taken into consideration by the trial court. Thus, it is urged that the position taken by the District Court in *Bel Air Markets v. Foremost Dairies, Inc., supra,* be employed in all hearings wherein there is the question of not only propriety of the class, but also adequacy of notice, a subject to be discussed below.

III.

The Concept of Fluid Recovery Is Inappropriate as Applied to Environmental Class Actions.

The concept of fluid recovery and its use to overcome problems of manageability decided in *Eisen III, supra,* are problems of serious concern not only in the *Eisen*-type factual situation, but even more so in environmental class actions for damages. Although this topic is treated separately and apart from the hearing question and the issue of notice discussed below, Amicus Edison does not intend thereby to suggest that the problem of damages and who is entitled to damages is exclusive of the hearing problem or the notice quetion. The use of the fluid recovery concept has a profound impact on the other two areas inasmuch as any hearing held to determine whether there are questions of fact or law common to the members of the class which predominate over questions affecting only individual members and the feasibility of providing adequate notice to all members of the purported class could hinge upon the concept of fluid recovery and general manageability of the action.

As employed in *Eisen III, supra,* and *Dolgow v. Anderson, supra,* fluid recovery is more than a concept of damages. It is a method whereby, due to the nature of the action, damages are easily ascertainable, but those to whom the damages are to flow are not. The concept allows for the creation of a fund composed of damages which are purportedly owed unascertainable plaintiffs and such fund is to be used for the benefit of the class in some manner. By allowing such an accumulation of the fund, the problems of determining whether or not there are common questions of fact

and how adequate notice is to be given to the members of the class under Rule 23(b)(3) can be improperly brushed aside in order to allow the action to proceed as a class action. The temptation to use the concept of fluid recovery in consumer cases, stockholder suits, securities violations and antitrust actions is unfortunately great due to the ease in some instances of determining damages by a formula. Such an approach totally ignores the actual problem suggested by the Advisory Committee's notes, *supra*, page 103.

It is submitted that the concept of fluid recovery, regardless of applicability in other situations, has no place in class actions under Rule 23(b)(3) based upon environmental causes of action against public utilities such as Amicus Edison because there are wholly different considerations involved. To employ the concept of fluid recovery is totally inappropriate because the various problems which fluid recovery is used to solve are not solved.

In an environmental class action seeking damages from a public utility under Rule 23(b)(3), the creation of a "fund" or "fluid recovery" will not result in the social benefit often attributed to fluid recovery. Generally speaking, environmental class actions have their greatest impact where an activity is prohibited or restricted with the absence of such activity inuring the benefit of the class. Further, because of the individual nature of damages that necessarily is a part of a class action any summary computation of them has a *res judicata* effect upon the whole class and may well be a denial of due process to the individual members. It will also be most awkward if not impossible to fairly administer any fund resulting from an environmental class action inasmuch as the damages to each

member of the class are of such an individual nature and expenditure of the fund for the benefit of the class as a whole is more esoteric than factual.

In *Dolgow v. Anderson, supra,* there was considerable discussion as to the prophylactic effect and social benefit that results from permitting a class action employing the concept of fluid recovery. One of the social justifications advanced was that the imposition of damages by way of a substantial fund prevented unjust enrichment to the offending party. Such a concept has no application in an environmental class action against a public utility. Unlike the purely entrepreneurial business enterprises involved in *Eisen* or *Dolgow*, a public utility such as the Southern California Edison Company, *Amisuc* herein, although a profit-making corporation, has its operation and revenue controlled by public agencies such as the Public Utilities Commission of the State of California. In order to obtain any increase in revenues, it is necessary and required that approval from that agency be obtained by the public utility. Thus any profits earned come under the close scrutiny of an agency which exists for the purpose of protecting the public.

Still more important in this regard is the fact that the mode of operation of a public utility is determined by factors beyond its control. For instance, the types of resources employed in order to produce energy are determined by the state of the art. No rational reason exists for imposing penalties upon a public utility for its mode of operation when the state of the art has a limited development. For example, if nuclear energy were employed to produce electrical energy and other forms of resources were not available, it would appear grossly unfair to penalize the public utility for pollution

of the environment in that the state of the art would be such that pollution was unavoidable. The social benefit of the production of electrical power, not only to the potential class, but society as a whole, is so great that the utility should not be tethered with the imposition of punitive judgments while satisfying social needs.

Additionally, in light of the present energy crisis, need for a public utility producing energy for the existence of human beings fulfills a much broader social need and affords a greater benefit than the operation of brokerage houses dealing in odd-lot purchases of stock. Thus, if overall social benefit is one of the bases for justifying the concept of fluid recovery, all factors weigh against the use of such recovery in situations wherein public utilities are involved.

Ironically, if the concept of fluid recovery is employed in a class action against a public utility, the very people who purportedly benefit from the use of such fund, may in actuality shoulder the burden of the cost of any such judgment. Traditionally, a public utility burdened with a judgment can reasonably be and is allowed to characterize such judgment as a legitimate cost of operation and thereby seek an adjustment of its rates from the consumer in order to recoup the loss of funds resulting from the judgment. Assuming that a fund were created resulting from an Environmental class action against a public utility, such a fund undoubtedly would be used for the benefit of the utility's consumers who would then pay by an increase in rates for this benefit. It would seem that a more realistic approach to the whole problem would be found in enjoining the offensive activity and leaving revenues avail-

able for reinvestment to improve the state of the art. The ultimate effect of the use of fluid recovery with regard to a public utility would be to penalize the consumer rather than the offending corporation. Thus there would be none of the purported salutary effect as in the case of seeking retribution against a corporation.

In addition to the fact that the social benefit argument is inapplicable in justifying the use of fluid recovery in an environmental class action against a public utility, the further problem of unmanageability cannot be solved by the use of the concept. In environmental cases based upon such things as air, water or radiation pollution, the vastness of the physical area involved makes it impossible to easily determine damage as a whole as in those situations presented by *Dolgow v. Anderson, supra,* and *Eisen III, supra.* In a Rule 23(b)(3) situation, there is no shortcut which can be employed to satisfy manageability. As pointed out by the Advisory Committee remarks, *supra* at 103, there is the danger of what might be called a class action that is really nothing more than a "mass accident" wherein there are injuries to numerous persons resulting from one incident. The concept of fluid recovery actually contravenes the very premise upon which a Rule 23(b)(3) action is based. For instance, under Rule 23(b)(3)(d) the difficulties likely to be encountered in the management of a class action are a specific factor to be considered. The use of fluid recovery in order to overcome this serious consideration merely begs the question. If fluid recovery were permitted, there would be little necessity for the trial court to go through the exercise of attempting to give notice under Rule 23(c)(2) as is demanded by that subdivision and necessary to protect the rights of all the members of the class.

Another reason for the rejection of the use of fluid recovery is the fact that it would eliminate the necessity of proving proximate cause or legal cause by the individual members of the class to establish their rights under the suit. The proximate cause element is a vital factor that must be proved by each and every member of the class in order to justify recovery. Thus, the use of fluid recovery not only glosses over the manageability question, but one of the necessary elements in any suit for damages, proximate cause. In addition to the disadvantages placed upon a defendant by the use of the concept of fluid recovery, there is the danger involved for plaintiffs who are members of the class. The concept violates the individual plaintiff's right of due process by denying his right to litigate the cause as a result of the *res judicata* effect. This is especially true where he may not have received notice or adequate notice of the action. Such a danger is real and not at all fictitious because of the ease in which fluid recovery can be used to justify overcoming not only problems of manageability, but problems of notice. The concept has a tendency of lulling trial courts into a false sense of security, and rationalizing the lack of necessity to give extensive and comprehensive notice as required by Rule 23(c)(2). This point will be further discussed hereinafter with respect to notice.

If social ill demands that some remedy be available, it would seem that the most likely alternative

relief may be found in actions brought by governmental agencies employing the concept of *parens patriae*. Such an approach was recently applied in the case of *Maine v. Tamano*, 357 F.Supp. 1097 (1973), wherein the State of Maine was permitted in an environmental action to represent all its constituents. There are, of course, limitations on this concept in situations arising under the Clayton Act. See *Hawaii v. Standard Oil Company of California, et al.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972).

Amicus Edison is in full agreement with the Court in *Eisen III, supra,* in rejecting the concept of fluid recovery because when reduced to its lowest common denominator, the trial court in the various actions applying the concept have acted unconstitutionally. Fluid recovery is not provided for in Rule 23(b)(3) and is an attempt to create a substantive rule of damages out of what is only a rule of procedure. Rule 23 as amended in 1966 does not impose upon trial courts the obligation of manufacturing manageability, but only that of determining whether those factors required exist in any action which is brought as a class action. The temptation to use the concept of fluid recovery where damages are easily ascertained should not be embraced especially in environmental class actions brought under Rule 23(b)(3) because of the substantial burden placed upon plaintiffs and defendants and the need to protect the interests of the parties.

IV.

The Requirement of Adequate Notice Evidencing Manageability of a Class Is Particularly Substantial in Any Environmental Class Action Brought Under Rule 23(b)(3).

The obligation of the trial court to satisfy the requirements of Rule 23(c)(2) in regard to notice to the class, raises many issues which, however break down into two general areas. First, who is to bear the burden of giving notice and second, the interrelationship between notice and manageability.

In a situation under Rule 23(b)(3) where an environmental action is brought against a public utility, the plaintiffs should be required to pay for notice. The reasoning in *Eisen III, supra,* is applicable in this situation because, as argued in *Eisen,* if the defendant who has been burdened with the payment of notice, should later prevail upon the merits, that defendant has no recourse to recover its costs from the plaintiff. This is especially true where the individual plaintiffs have a very limited interest in the lawsuit, and many of the members of the class are not located, due to the use of the concept of fluid recovery. This problem is very telling with respect to a public utility which is compelled to pay for notice and has no recourse for such a legal expense against the parties bringing the suit. Ultimately, the private public utility is compelled to recover its cost, if at all possible, because of its fiduciary duty to its stockholders, by passing that expense on to its consumers, through rate adjustments. This is patently unfair to the consumers who were never parties to the action, or in any other way involved in that they are forced to ultimately finance the expense of the specious lawsuit. Further, in an environmental

class action under Rule 23(b)(3), the argument that information with respect to the class is more available to the public utility is not true. This situation differs greatly from the case where the class is composed of consumers of the public utility, or the stockholders of a corporation who are regularly contacted by and whose existence is in the knowledge of corporation. Thus, there is no reason why there should be any departure from the rule of compelling plaintiffs to carry the burden of a lawsuit which they have brought. In the instance where a governmental agency is a plaintiff bringing a class action on behalf of its constituents, a strong argument also exists for compelling those constituents to bear the burden of such things as giving notice because the action is brought on their behalf.

A corollary and negative environmental effect also results where the public utility is compelled to pay for notice in an environmental class action, as this results in the diversion of revenue which could, and would, otherwise be employed to develop new energy sources. One of the major problems faced not only by public utilities, but the population as a whole, is the development of alternative and new sources of energy. Again, where there is a diversion of economic resources, the obligation of paying for everything falls upon the consumer through rate adjustments. Although rate structure has been recognized as being an environmental factor (See *United States v. S.C.R.A.P.*, 5 E.R.C. 1449) the effectiveness of class actions in order to affect rate structure by forcing increases in order to pay judgments is at best, rather remote.

The second issue with respect to notice, and its effect on manageability of a class action involves a number of considerations. The requirements under Rule 23 (c)(2) strongly demand that a comprehensive hearing on notice satisfying due process requirements be held for the protection of plaintiffs and defendants, as this requirement is an integral part of establishing whether or not a class action properly exists and the composition of the class. Class actions brought under Rule 23(b)(3), necessitate a very conscientious effort because the language in Rule 23(c)(2) requires the giving of not only individual notice, but also the best notice practicable under the circumstances. It is difficult to envision how such a stringent requirement can be satisfied without employing a hearing held under conditions where all the due process requirements are envoked inasmuch as the notice obligation is such a basic part of an action under Rule 23(b)(3).

Aside from the language found in Rule 23(c)(2), there remains another compelling reason for achieving the highest degree of notice to the class possible. This is because of the *res judicata* effect of class actions brought under Rule 23(b)(3), and the requirement of members of the class that they express their desire not to be bound by the result of the case. Members of the class not wishing to participate must take some affirmative action to "opt out." Unlike the old "spurious class action" situation, the ramifications upon members of the class are considerable. Due to this fact, no stone should be left unturned in seeking to give adequate and comprehensive notice to all members who may be affected. For this reason alone, it would appear necessary for the court to narrowly construe and apply Rule 23(b)(3) in determining whether or not a class

action may be maintained. Inclusion within a class also places other burdens upon members for failing to "opt out" such as being subject to discovery procedures, contempt proceedings, and costs should the case be unsuccessful. For these reasons, it would appear prudent for the courts to very narrowly construe those situations in which Rule 23(b)(3) may be employed.

As is suggested above, a full complete hearing should be undertaken by the trial court in order to deal with the notice requirements. It is here further suggested that during such a hearing, the form of notice, its contents, and who is to receive it must be determined. However, despite the completeness of such a hearing, the constitutional requirements of due process would still not be satisfied without the holding of another hearing in order to ascertain the adequacy of what had been done. This suggestion may give rise to the argument that there be various stages of notice; that is, the first notice which is given need not be as complete and comprehensive as a subsequent notice at which time, further considerations, and more knowledge about the action have been ascertained and additional plaintiffs have been disclosed. Such an approach is an equally fallacious attempt as the concept of fluid recovery to ignore the demanding requirements of an action under Rule 23(b)(3), and flies in the face of the mandatory obligation of the trial court to determine by order, as soon as practicable, whether the action may be maintained as a class action. To give anything but the most conscientious and complete notice possible in the first instance would amount to a derogation of the obligation established by Rule 23. The subsequent hearing, suggested herein and urged, is a method of perfecting notice, and in effect, also determining manageability.

The notice requirement is an integral part of manageability in a class action brought under Rule 23(b)(3). If adequate notice cannot be given, the only conclusion is that the action may not be maintained as a class action. As suggested previously, use of the fluid recovery concept is also merely a method of glossing over the inability to give adequate notice.

Conclusion.

For the foregoing reasons, Amicus Southern California Edison Company respectfully requests that this Court evaluate the *Eisen* case in light of the considerations unique to private environmental class actions seeking money damages.

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